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# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 989

LAW MOTOR FREIGHT, INC. AND NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., PETITIONERS

*v.*

CIVIL AERONAUTICS BOARD, ET AL.

No. 1160

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC. AND UNITED MOTOR FREIGHT, INC., PETITIONERS

*v.*

CIVIL AERONAUTICS BOARD, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND DISTRICT OF COLUMBIA CIRCUITS*

## BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

### OPINIONS BELOW[1]

The opinion of the Court of Appeals for the First Circuit in No. 989 (Pet. App. 13a–24a) is reported

[1] This brief is filed in opposition to two petitions for certiorari. Although separately filed, and challenging judgments of different courts, the issues are the same in both cases and in the first of the two to be filed (No. 989) petitioners "ask the Court to treat the statement of reasons why a writ should be granted" in the second case (No. 1160) "as the reasons why a writ should be granted in this case" (No. 989, Pet. 7–8).

at 364 F. 2d 139. The order of the Civil Aeronautics Board (Pet. App. 26a–31a) is not yet reported.

The Court of Appeals for the District of Columbia Circuit wrote no opinion in No. 1160, although a dissenting opinion (Pet. App. 14a–17a) was written. That court's judgment (Pet. App. 14a) is not yet reported. The order of the Civil Aeronautics Board (Pet. App. 17a–22a) is not yet reported.

## JURISDICTION

The judgment of the court of appeals in No. 989 was entered on July 20, 1966, and a petition for rehearing was denied on August 23, 1966 (Pet. App. 25a). On November 23, 1966, Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to and including January 20, 1967. The petition was filed on that date.

The judgment of the court of appeals in No. 1160 (Pet. App. 14a) was entered on December 6, 1966. By orders of Mr. Justice Brennan, dated March 6, 1967, and March 10, 1967, the time for filing a petition for certiorari was extended first to March 10, 1967, and then to March 27, 1967. The petition was filed on March 17, 1967.

The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, as a prerequisite to accepting air carrier tariffs setting forth motor vehicle pickup and delivery "services [to be provided] in connection with * * * air transportation" by the air carrier, within the meaning of Section 403(a) of the Federal Aviation Act, the Civil Aeronautics Board was re-

quired (a) to attempt to determine the status of the services under Section 203(b)(7a) of the Interstate Commerce Act, which exempts from ICC economic regulation motor transportation "incidental to transportation by aircraft", or (b) to await a Commission determination thereunder.

2. Whether, in determining to accept the tariffs, the Board's conclusion that the services described were "in connection with * * * air transportation" was based upon adequate and proper standards.

3. Whether the Civil Aeronautics Board in any event was required, prior to acceptance of the tariffs, to hold evidentiary hearings at the instance of motor carriers asserting competitive impact from the pickup and delivery services where (a) the statute requires none; (b) petitioners were given notice and an opportunity to present facts and argument in rebuttal to the matters set forth in the application for leave to file the tariffs; and (c) petitioners tendered no issues of material fact.

## STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301 *et seq.*, Part II of the Interstate Commerce Act, 49 Stat 543, 49 U.S.C. 301 *et seq.*, the regulations of the Civil Aeronautics Board and those of the Interstate Commerce Commission are set forth in the appendices (1a–12a) of both petitions for certiorari.

## STATEMENT

These cases involve two orders issued by the Civil Aeronautics Board permitting Emery Air Freight

Corporation, a Board-licensed air freight forwarder,[2] to amend its air carrier tariffs so as to include pickup and delivery services to two points more than 25 miles from Boston and Detroit respectively. The tariff amendment contested in No. 989 provided for pickup and delivery service between Boston and Nashua, New Hampshire, located some nine miles beyond the perimeter of the 25-mile zone. The one involved in No. 1160 provided for such service between Detroit and Flint, Michigan, situated about 20 miles outside the 25-mile zone. Petitioners represent motor carrier interests in competition with Emery. In both cases, the Board found that the new points to be served were reasonably close to the principal cities and that, for purposes of air freight, each was, as a practical matter, a part of the area served by the airports of those larger cities. It also found that the proposed services would be rendered with equipment of the type traditionally used for pickup and delivery operations; that schedules would be closely coordinated with air schedules at the principal cities; and that rates were to be closely related to those charged for pickup and delivery services within the 25-mile zone. The Board

[2] Air freight forwarders are "indirect carriers" within the meaning of Section 101(3) of the Federal Aviation Act (49 U.S.C. 1301(3)) and hence require operating authority from the Board. They operate pursuant to a blanket exemption from the provisions of Section 401 of the Act (49 U.S.C. 1371), which requires air carriers to obtain certificates of public convenience and necessity as a condition precedent to lawful operation. See 14 C.F.R. 296. They are not, however, exempt from the tariff requirements of the Act. See generally *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C.A. 7).

concluded that the services were pickup and delivery in character and properly includible in an air carrier tariff under Section 403(a) of the Federal Aviation Act (49 U.S.C. 1373(a)) as a "service in connection with * * * air transportation."

In order to perform a complete door-to-door service, air carriers engaged in the transportation of air freight have for many years held out to the public motor vehicle pickup and delivery services, performed either with their own trucks or under contracts with independent motor carriers who act as agents of the air carriers. Pursuant to Section 403(a) of the Act, which provides that, "to the extent required by regulations of the Board," air carrier tariffs shall show those "services in connection with * * * air transportation" which the carriers undertake to provide, the Civil Aeronautics Board requires air carriers to include in their tariffs whatever pickup and delivery services they offer. As a general rule, the Board has accepted tariffs without further inquiry if the pickup and delivery services were to be provided within a 25-mile radius of the point served by the air carrier.[3]

Motor carrier operations, of course, are generally subject to economic regulation by the Interstate Commerce Commission. However, Section 203(b)(7a) of the Interstate Commerce Act exempts from such regulation the "transportation of persons or property by motor vehicle when incidental to transportation by air-

[3] Tariffs to points well beyond the 25-mile zone were also filed and accepted, prior to the issuance of pertinent regulations in 1964 (see *infra*, pp. 6–7).

craft.". When the Board accepts for filing an air carrier's pickup and delivery service tariff, this is neither a license to conduct motor transportation nor a determination under Section 203(b)(7a) that no license is required. The Commission alone determines whether the motor vehicle operation is subject to the certification requirements of the Interstate Commerce Act or is exempt under Section 203(b)(7a).

In recognition of the fact that the provisions of Sections 203(b)(7a) and 403(a) of the respective Acts are interrelated, though not identical in scope, and in order to minimize the possibility of interagency conflict, the Board and the Commission cooperated in the issuance of formal regulations in 1964. The Board's regulation, 14 C.F.R. Part 222 (No. 1160, Pet. App. 10a–11a), dealt with tariffs already on file with it and new ones which might be filed in the future.[4] With respect to existing tariffs, including those showing service to places more than 25 miles from the certificated point, it provided for their continued effectiveness. With respect to future tariffs, it provided automatic authority for the filing of tariffs covering service to places within 25 miles of either the airport or the city limits of the certificated point, and established a procedure under which permission may be granted, upon application, to file new tariffs showing such service to points beyond the 25-mile zone. It is the Board's grant of two applications for such permission which is challenged in these cases.

[4] The opinion issued by the Board in promulgating its regulation is set forth in the Appendix to both petitions for certiorari, at pp. 6a–10a. The opinion promulgating the Com-

Under the Commission's regulation, 49 C.F.R. 210.40 (No. 1160, Pet. App. 3a–5a), motor transportation of property falls within the Section 203(b)(7a) exemption if (1) "it is confined to the transportation of shipments in bona fide collection, delivery, or transfer service performed within the terminal area of the direct air carrier * * * providing the line-haul transportation, which terminal area * * * has been described in a tariff filed with and accepted by the Civil Aeronautics Board," and (2) "it is confined to the transportation of shipments which have been received from or will be delivered to a direct air carrier * * * as part of a continuous movement which * * * shall be provided for in tariffs filed with and accepted by the Civil Aeronautics Board, and shall be performed on a through air bill of lading covering, in addition to the line-haul movement by air, the collection, delivery, or transfer service performed by the motor carrier." Although the regulation thus continued the previous practice of treating as exempt those services described in air carrier pickup and delivery service tariffs on file with the Board, the Commission established a procedure under which, either on "its own motion or upon petition filed by any interested person," it could define for itself the boundaries of the terminal zone of a particular airport or city, "differing in extent from the terminal areas of * * * air carriers * * * as defined in tariffs filed with and accepted by the Civil Aeronautics Board" (No. 1160, Pet. App. 4a).

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mission's regulation is reported as *Motor Transportation of Property Incidental to Transportation by Aircraft*, 95 M.C.C. 71.

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In permitting Emery to file the tariff amendments here involved, the Board rejected a contention by petitioners that the applications should be dismissed because they failed to show that the transportation would be exempt from Commission regulation under Section 203(b)(7a). The Board held that it was for the Commission to determine whether the operations required authorization by it. Also rejected were petitioners' alternative request that evidentiary hearings be held as to each of these matters. The Board pointed out that hearings are not required by the pertinent statutory provisions, and that no issues of material fact had been developed, notwithstanding the fact that all parties had had full opportunity to submit whatever data they wished.

The first of the Board's orders, the one involving Nashua (No. 989), was affirmed by the Court of Appeals for the First Circuit. The court rejected petitioners' contention of procedural irregularity, holding that a hearing was not statutorily required, and that none was required as a matter of constitutional necessity, since petitioners' only interest stemmed from the increased competition which Emery would provide. On the merits, it found reasonable the factors upon which the Board relied in determining that the operation would be a pickup and delivery service in connection with air transportation within the meaning of the Federal Aviation Act. It pointed out that the regulations of the Board and the Commission reflect "a continuing accommodation between two independent agencies," while at the same time preserving

the independent authority of each to interpret and apply the provisions of the statute it administers. The court observed that petitioners had not sought a determination of the status of the service under the Interstate Commerce Act, and that "there is not even a conflict between administrative actions" (No. 989, Pet. App. 24a).

The second order, involving Flint, was affirmed by the Court of Appeals for the District of Columbia Circuit, in a *per curiam* decision, with one judge dissenting, on the basis of the First Circuit's earlier holding (No. 1160, Pet. App. 14a).

## ARGUMENT

These cases were correctly decided by the courts below, present no conflict of judicial or administrative decisions, and do not warrant review by this Court.

1. The Civil Aeronautics Board's determinations, upheld by both courts of appeals for the same reasons, involve no more than administrative approval of the contents of an air carrier's tariff. As the First Circuit observed, because of interagency cooperation and comity, there is no conflict between the Board and the Interstate Commerce Commission. Under its regulation and in the orders under review, the Board leaves to the Commission the question of the status of pickup and delivery services under the Interstate Commerce Act and recognizes that a certificate from the Commission would be necessary for the performance of the services if the Commission should determine that they are not exempt under Section 203(b)(7a). Moreover, the Commission's

regulation establishes a special procedure for determination by it, either upon petition or the Commission's own initiative, of this precise queston. Petitioners have not sought such a determination with respect to the pickup and delivery services here involved; nor has the Commission undertaken such an inquiry on its own initiative, notwithstanding that it is fully aware of the Board's actions.[5]

2. Petitioners' basic contention is that the Board's acceptance of a pickup and delivery service tariff under Section 403(a) is a "license" to engage in motor transportation, and hence that such a tariff can be accepted only if the service described therein is exempted by Section 203(b)(7a) from certification under the Interstate Commerce Act. However, in recognition of the fact that it is for the Commission to determine whether any motor vehicle operation requires its certification,[6] neither the Board's regulation nor the orders here involved purport to license motor transportation or to determine its status under the

[5] See the letter, set forth as an Appendix to this brief, from the General Counsel of the Interstate Commerce Commission to the Department of Justice with respect to this litigation. In this connection, we note petitioners' suggestion that this letter indicates the existence of inevitable interagency conflict (No. 1160, Pet. 20). Read in its entirety, however, the letter indicates precisely the opposite. We are authorized to state that the Interstate Commerce Commission concurs in the views expressed in the instant brief in opposition.

[6] See *Air Dispatch* v. *United States*, 237 F. Supp. 450 (E.D. Pa.), affirmed *per curiam*, 381 U.S. 412; *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (C.A.D.C.); *Wycoff Co.* v. *United States*, 240 F. Supp. 304 (D. Utah).

Interstate Commerce Act.[7] The Board simply decided that the motor transportation service described in the tariffs in question meets the standards of the Federal Aviation Act for an air carrier's tariff. It constitutes a service which the air carrier undertakes to provide; this service may or may not require operating authority from the Commission. Petitioner's remedy for testing this question lies in the Commission.

The courts below properly held that each agency has independent authority to interpret and apply its own statute (see the cases cited in note 6, *supra*). Actual experience has shown, moreover, that this does not create interagency conflict precisely because the Board recognizes the independence of the Commission with respect to the applicability of the Interstate Commerce Act.[8]

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[7] As the Board said in its notice of proposed rulemaking (26 Fed. Reg. 8037), "[N]or does the Board specifically license or directly control the provision of such service. The exercise of Board authority has heretofore been confined to accepting or rejecting tariffs filed under Section 403(a) of the Act as providing service 'in connection with * * * air transportation.' Whether or not the surface transportation under the terms of a tariff may be lawfully performed depends primarily upon whether it is a service which is 'incidental to transportation by aircraft' under the Interstate Commerce Act and thus exempted pursuant to that statute." See also the Board's opinion promulgating the pickup and delivery service tariff regulation (No. 1160. Pet. App. 7a).

[8] If the Commission were to determine that the motor transportation described in an air carrier tariff on file with the Board required a license from the Commission and were to deny such a license, the carrier would, of course, be unable to provide the service and thus would have to cancel the tariff. This would not conflict with the Board's determination, however, which amounts to no more than that the service, *if provided*, is the

3. There is no merit to petitioners' challenge to the standards applied by the Board in implementing Section 403(a) and its own regulation thereunder. As the courts below held (No. 989, Pet. App. 24a), the Board's "formula [was] a combination of reasonably close communities where service is rendered in smaller trucks, closely tied in with air schedules, and where rates are geared to the smaller shipments." The Board relied upon the fact that, from a practical and operational point of view, the service was of a sort characteristic of air freight pickup and delivery service, and that it would be provided to points which were reasonably close to Boston and Detroit[9] and which were a part of the area served by the airports of those principal cities for air freight purposes.[10] Under these standards, the Board's decisions are

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sort of service which must be described in the air carrier's tariff.

[9] We note the footnote contention of petitioners in No. 1160 (Pet. 6) that Flint is 65 to 80 miles from the Detroit airports, depending on the route used. This overlooks the fact that, in computing distances for pickup and delivery service purposes under the Board's regulation, either the airports or the city limits of the point in question are used (No. 1160, Pet. App. 10a). We also note in this connection that Metropolitan Airport, the closer of the two Detroit airports, is approximately 17 miles southwest of the city. If it were located a similar distance to the northwest of the city, Flint would be barely three miles beyond the 25-mile zone.

[10] The contention that the Board's findings lack adequate factual support plainly does not call for this Court's consideration. It relates, moreover, largely to the alleged lack of showing of a "nexus" between Detroit and Flint. The carrier's application, however, set forth facts which, in sum, showed that, for air freight purposes, Flint was essentially a satellite of Detroit.

plainly supported by substantial evidence. As the First Circuit observed, this approach is "not unreasonable for an agency mandated to develop air transportation."[11] It is therefore entitled to respect by the courts. *Udall* v. *Tallman*, 380 U.S. 1, 4. That respect was properly accorded by the courts below.

4. As to petitioners' contention that the Board was required to hold evidentiary hearings, it is immaterial whether its actions are viewed as rulemaking or adjudication. Assuming them to have been the latter, no hearings were required. In contrast to numerous other provisions, Section 403(a) contains no requirement for a hearing prior to Board action thereunder. The courts below properly concluded that the express requirement of a hearing in numerous sections of the Act and the absence of such a requirement in others indicate that the "legislative omission was significant," and that a hearing is not necessary unless specifically directed.[12] Moreover, as the courts below properly found, petitioners raised no issues of material fact in their oppositions to the applications. See *Railway Express Agency* v. *Civil Aeronautics*

[11] The Board is under an affirmative statutory directive (49 U.S.C. 1302) to promote and develop air transportation, including air freight. See *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417 (C.A.D.C.). It was pursuant to this directive that the Board promulgated its pickup and delivery service tariff regulation (see Pet. App. 8a).

[12] *American Trucking Associations* v. *United States*, 344 U.S. 298, 319, 320; *Nebraska Department of Aeronautics* v. *Civil Aeronautics Board*, 298 F. 2d 286, 292 (C.A. 8); *Eastern Airlines* v. *Civil Aeronautics Board*, 185 F. 2d 426, 427 (C.A.D.C.), vacated as moot, 341 U.S. 901.

*Board,* 345 F. 2d 445 (C.A.D.C.), certiorari denied, 382 U.S. 879; *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission,* No. 20,350, C.A.D.C., decided February 28, 1967.[13]

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted.

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APRIL 1967.

[13] We note that the affidavit filed in opposition to the application involved in No. 1160 raised no more than a question as to whether the proposed service could be "economically or efficiently" performed.

# APPENDIX

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
*Washington, D.C. 20423,* LSG:ch, *March 28, 1966.*

Re: *National Motor Freight Traffic Association, Inc., et al.* v. *Civil Aeronautics Board,* C.A.D.C. No. 19953.

HOWARD E. SHAPIRO, Esq.,
*Assistant Chief, Appellate Section, Antitrust Division, Department of Justice, Washington, D.C. 20530.*

DEAR MR. SHAPIRO: In your letter of March 21, 1966, you requested our comments on the petition for review of the Board's order of December 6, 1965, in the above case. By this order the Board permitted Emery Air Freight Corporation, an air freight forwarder, to file tariffs governing motor carrier service from Detroit airports to Flint, Michigan, a distance of 45 miles.

The petitioner in the Court of Appeals is the tariff-filing agent of most of the major motor common carriers of property in the United States. It argues, 1) the Board is without authority to accept Emery's tariff for filing, for such tariff permits a motor carrier operation beyond a reasonable terminal area of the Detroit airports without any operating authority from the Interstate Commerce Commission; and 2) the Board's finding that Emery's operation is a bona fide pickup and delivery service is not supported by substantial evidence. I believe that the Board's decision presents no conflict with the jurisdiction of this Commission.

The effect of the Board's decision is to permit Emery to file a tariff under the applicable standards of Section 403(a) of the Federal Aviation Act, 49 U.S.C. § 1373(a). The Board has found that in its view Emery will provide a bona fide pickup and delivery "service in connection with * * * air transportation," in the language of Section 403(a). It expressly refused "to reflect any views on whether applicant [Emery] or its motor carrier agent requires additional authority from the I.C.C. or other regulatory agencies." Order of December 6, 1965, p. 4, note 5.

The Board's present order is similar to the decision sustained in *City of Philadelphia* v. *Civil Aeronautics Board*, 289 F. 2d 770 (D.C. Cir. 1961), where the Board decided that an airline could use a motor carrier to perform "air transportation" under an air carrier certificate without deciding whether the airline or its motor carrier agent needed additional authority from the Interstate Commerce Commission to perform the motor carrier service. The Board was sustained in the Court of Appeals essentially on the grounds, which also apply to the present case, that the Board is not precluded from deciding whether a motor carrier operation complies with the requirements of the Aviation Act although the operation may not be in compliance with the requirements of the Interstate Commerce Act. Whether a particular motor carrier operation is exempt from the latter act under Section 203(b)(7a), 49 U.S.C. § 303(b)(7a), is in either event for this Commission to decide.

Moreover, in the present case the petitioner has other specific administrative remedies available to it, if it believes Emery is operating beyond the exemptions of Section 203(b)(7a). The Board acted pursuant to 14 CFR Part 222 in accepting Emery's

tariff for filing. These rules were adopted concurrently with ICC regulations (49 CFR 210.40(c)) which provide for individual determination of exempt zones under Section 203(b)(7a), *after* the CAB has acted. Petitioner, therefore, may file a petition with the Commission requesting it to determine appropriate boundaries for the exempt zone(s) around the Detroit airports which may differ in extent from the terminal area defined in tariffs accepted by the CAB. If the ICC should decide that for purposes of Section 203(b)(7a) the terminal area around the Detroit airports cannot be as large as the terminal area satisfying Section 403(a) of the Aviation Act, presumably Emery will have to obtain appropriate ICC operating authority to perform that part of its motor service which is not exempt from the Interstate Commerce Act.

The petitioner may argue in the pending litigation that the Board's action, without the concurrence of the ICC, creates a potential conflict in their respective jurisdictions, for basic to both Section 403 and 203(b)(7a) is a determination of whether Emery is performing a bona fide pickup and delivery service. If it is performing such a service, then its motor carrier operation will be both, "in connection with" air transportation (under Section 403(a) of the Aviation Act) and "incidental" to transportation by aircraft (under Section 203(b)(7a) of the Interstate Commerce Act).

The draftsmen of the CAB and ICC regulations in this area foresaw the potential "conflict". The Board, for example, stated the following in adopting Part 222 (29 F.R. 6276):

> Subsequent acceptance by the Board of air cargo pickup and delivery tariffs under these standards would not, of course, interfere with the freedom of the ICC to determine whether

the related motor transportation did or did not come within the section 203(b)(7a) exemption. The Board anticipates, however, that the ICC will give due and appropriate weight to the Board's findings and that the contemplated services are, truly air cargo pickup and delivery in nature, as it does today.

We may assume, therefore, that although the Board has found Emery is providing a bona fide pickup and delivery service, the Commission may not so find. The Commission will, of course, give weight to the Board's decision, but will not be bound by that decision. Both the Board and ICC decisions must be supported by substantial evidence, and it is not unusual that substantial evidence may support more than one result on the same record. See *Consolo* v. *Federal Maritime Commission,* No. 63, U.S.S. Ct. p. 12 of slip opinion, decided March 22, 1966, and cases cited. I, of course, cannot now say whether the Commission would give the same weight to each of the factors that convinced the Board that Emery is providing a bona fide pickup and delivery service between Detroit and Flint; nor do I comment on whether the Board's finding is supported by substantial evidence.

I hope you will find the foregoing comments helpful.

Yours very truly,

(S) Robert W. Ginnane,
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